

In: KSC-BC-2020-06
Specialist Prosecutor v. Hashim Thaçi, Kadri Veseli, Rexhep Selimi and Jakup Krasniqi

Before: Trial Panel II
Judge Charles L. Smith III, Presiding
Judge Christoph Barthe
Judge Guénaël Mettraux
Judge Fergal Gaynor, Reserve Judge

Registrar: Dr. Fidelma Donlon

Filing Participant: Specialist Counsel for Hashim Thaçi
Specialist Counsel for Kadri Veseli
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Public Redacted Version of Joint Defence Response to Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request

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I. INTRODUCTION

1. One of the fundamental purposes of Rule 154¹ is to permit the streamlining of a trial, reducing the time required for direct examination by the calling party, whilst allowing the Defence to retain its right to cross-examination. The Defence for Messrs. Thaçi, Veseli, Selimi, and Krasniqi (“Defence”) responds to the Prosecution’s latest motion for admission of evidence pursuant to Rule 154.²

2. The SPO seeks admission pursuant to Rule 154 of the prior statements and associated exhibits of ten witnesses. The Defence objects to parts of the tendered material on the grounds that (i) the SPO has failed to substantiate its relevance; (ii) the documents tendered as associated exhibits do not constitute an indispensable or inseparable part of the statements to which they relate; (iii) their probative value is outweighed by their prejudicial effect, and (iv) the time-saving function of admission pursuant to Rule 154 is overshadowed by the lengthy *viva voce* testimony sought by the SPO.

3. This filing is submitted confidentially because it responds to a filing with the same classification.

II. SUBMISSIONS

A. W01163

¹ Rules of Procedure and Evidence on the Kosovo Specialist Chambers (“Rules”).

² KSC-BC-2020-06, F01980, Specialist Prosecutor, *Prosecution Motion for Admission of Evidence of Witnesses W01163, W02144, W02749, W04230, W04445, W04489, W04576, W04739, W04741, and W04820 Pursuant to Rule 154 and Related Request* (“Request”), 4 December 2023, confidential, with Annexes 1-10, confidential.

4. The Defence does not contest the *prima facie* authenticity and reliability of W01163's Rule 154 Statements.³ The Defence notes that W01663's statements are short and the time projected for direct examination is still 1.5 hours. Given the scope of the statements, the Defence objects to the admission of this evidence pursuant to Rule 154 due to the lack of any substantial time saving under such circumstances. In the alternative, the Defence suggests that the SPO reduces its time for direct examination of W01163.

5. The Defence contests whether W01163's evidence may be admitted pursuant to Rule 154, given the content of her statements. W01163's account of [REDACTED] abduction by the KLA is uncorroborated. Almost all of the evidence cited in the SPO PTB in relation to the abduction are W01163's statements.⁴ There appear to be no other SPO witnesses who were present at the time of the alleged abduction. Therefore, no other SPO witness can testify to this event.

6. Regarding the alleged abductions of [REDACTED], the only relevant evidence that W01163 can give is hearsay. W01163 was the neighbour of W00200, a deceased witness whose evidence the SPO will tender pursuant to Rule 155. W01163 provides second-hand evidence relaying what W00200 told her regarding the alleged abduction of [REDACTED].⁵ In effect, the Prosecution intends to use W01163 as a mechanism to admit allegations made by W00200, which can only be properly tendered through an application to admit the statements of W00200.

³ 030668-030669-ET Revised; 030655-030659-ET Revised; 009819-TR-ET Part 1 RED2; 009819-TR-ET Part 2 RED; 009819-TR-ET Part 3 RED; 009819-TR-ET Part 4 RED2, confidential.

⁴ KSC-BC-2020-06, F01594/A03, Specialist Prosecutor, *Lesser Redacted Version of 'Confidential Redacted Version of Corrected Version of Prosecution Pre-Trial Brief' ("SPO PTB")*, 9 June 2023, confidential, paras 645-646.

⁵ 030655-030659-ET, p. 030658.

7. The limited probative value of W00163's evidence does not outweigh the prejudicial effect of its admission, with a significant proportion of W01163's overall evidence relying entirely on hearsay.

8. Moreover, the SPO seeks amendment of the Exhibit List in order to enable its tendering of W01163's interview before [REDACTED]⁶ into evidence.⁷ It is both untimely and prejudicial to the Defence to request amendment of the Exhibit List simultaneously with requesting to admit such item into evidence. The Defence objects to such a late amendment of the Exhibit list and to the admission of such statements into evidence.

9. The Defence takes no issue at present with W01163's associated exhibit tendered for admission.

B. W02144

10. W02144 will provide evidence on his meetings with all four Accused at various points in the Indictment Period.⁸ The Defence does not contest the *prima facie* authenticity and reliability of his proposed statements, which are official records of his testimony in [REDACTED]⁹ and his interview with the SPO.¹⁰

11. Regarding W02144's associated exhibits, the Defence does not object to W02144's notes,¹¹ discussed extensively during his [REDACTED] and acknowledged by the

⁶ SITF00314867-SITF00314871-ET RED.

⁷ Request, paras 11-12.

⁸ *Idem*, paras 14-19.

⁹ IT-03-66 T634-T666; IT-03-66 20041122 Part 1; IT-03-66 20041122 Part 2; IT-03-66 T667-T767; IT-03-66 20041123 Part 1; IT-03-66 20041123 Part 2; IT-03-66 20041123 Part 3.

¹⁰ 075993-076009; 075993-076009-AT.

¹¹ IT-05-87_1 P00480_E; IT-03-66-P61a; IT-05-87.1 P00482; IT-03-66 P64a; IT-05-87.1 P00482.

witness as his own.¹² Other associated documents are also discussed in W02144's SPO statement¹³ and they therefore represent an inseparable part of the evidentiary record associated with W02144. However, the UNMIK memoranda¹⁴ are commented upon by W02144 only to the extent that he was "generally aware"¹⁵ of the information contained therein. The Defence suggests that it forms neither an inseparable nor an indispensable part of W02144's statement and that the weight attributed to it should be low.

12. The Defence notes that the SPO has allotted two hours for direct examination. Recognising Trial Panel II's ("the Panel") request that court time be used as expeditiously as possible,¹⁶ the Defence notes that the time saved through the use of Rule 154, would be minimal.

C. W02749

13. In relation to W02749, the SPO offers four statements for admission.¹⁷ The Defence does not object to the admission of W02749's SPO interviews on [REDACTED]¹⁸. Nonetheless, the Defence submits that the statement to the [REDACTED]¹⁹ and the SITF investigator's report dated [REDACTED]²⁰ do not meet the minimum *indicia* of authenticity to be admitted pursuant to Rule 154.

¹² IT-03-66 T634-T666, p. 697, lines 17-18; p. 706, lines 18-20; p. 709, lines 21-22; p. 713, lines 11-12.

¹³ 075993-076009, paras 13-21.

¹⁴ SPOE00212696-00212697; SITF40000141-4000143.

¹⁵ 075993-076009, para. 62.

¹⁶ KSC-BC-2020-06, Transcript of Hearing, 11 December 2023 ("Transcript of 11 December"), confidential, pp. 10951-10952.

¹⁷ SITF00255061-SITF00255068-ET Revised; 030943-030946 RED2; 070990-TR-ET Parts 2-3; 072709-TR-ET Parts 1-2 RED2.

¹⁸ 072709-TR-ET Parts 1-2 RED2.

¹⁹ SITF00255061-SITF00255068-ET Revised.

²⁰ 030943-030946 RED2.

14. Although signed, the witness' statement to [REDACTED] lacks many of the basic *indicia* which the SPO traditionally refers to in support of a statement's authenticity. First, the Defence incorporates by reference its previous submissions on the lack of authenticity and reliability of documents emanating from the Serbian State.²¹ Second, and contrary to the SPO's submissions,²² the document is undated; the only visible date contained in the document is 22 October 2003, which is not the date of the interview, but the date the document was faxed from [REDACTED] to an unknown recipient. The fact that this date is part of a fax stamp is evident from the Serbian original of the document.²³ Third, the document does not indicate the names of participants in the interview, nor does it contain any warning, statement of rights, or witness acknowledgment. In light of this deficiencies, the document does not meet the minimum standard for admission pursuant to Rule 154.

15. The SPO also seeks to tender an SITF investigator's report dated [REDACTED],²⁴ describing the contents of a conversation between the SITF investigators and W02749. Notably, the report is neither contemporaneous nor drafted shortly after the purported meeting with W02749, but instead was compiled more than 20 days later.²⁵ The document is not signed by the witness, nor there is any indication that he was present when the report was compiled. The document lacks the most basic requirements to be considered a 'witness statement' for the purposes of Rule 154.

16. Concerning the associated exhibits, the Defence does not object to the admission of 070982-070988, and notes that 028547-028556 and 028566-028596 are not tendered

²¹ KSC-BC-2020-06, F00877, Joint Defence, *Joint Defence Motion for Disclosure Pursuant to Rule 103*, 12 July 2022, confidential, paras 30-65.

²² Annex 3 to the Request, p. 1, row 1.

²³ SITF00255061-SITF00255068.

²⁴ 030943-030946 RED2.

²⁵ The meeting with W02749 purportedly occurred on [REDACTED], while the report is dated [REDACTED].

for admission.²⁶ With regard to 072697-072708, the Defence submits that the Panel's decision on admission should be deferred until after cross-examination, so that additional information can be elicited from the witness with regard to the provenance of the pictures therein. The witness' account of when and how he came in possession of the pictures is contradictory. In his SPO interview of [REDACTED], the witness stated that he discovered the pictures "ten years ago",²⁷ while in his [REDACTED] SPO interview, he said it was in 2013-2014.²⁸ Further, while the witness claims that he came across the pictures [REDACTED]²⁹ is available to the Defence.

17. As the Defence intends to explore the provenance of the pictures in more detail during cross-examination, the documents should be marked for identification at this stage, and any decision on admission should be postponed.

D. W04230

18. The Defence opposes, however, the suitability of W04230's proposed evidence for Rule 154 admission. The Defence takes issue with the two additional hours of direct examination that the SPO requires for supplemental questions.³⁰ Two hours cannot reasonably be considered "brief oral testimony".³¹ This is especially so considering that W04230's proposed evidence consists of one SPO interview which amounts to 84 pages and one associated exhibit. In comparison, the SPO has allocated the same amount of time for the direct examination of W04765, whose Rule 154 statement amounts to 294 pages and 17 associated exhibits.³²

²⁶ Annex 3 to the Request, p. 4, rows 3-4.

²⁷ 072709-TR-ET Part 1, p. 2, line 25 to p. 3, line 1.

²⁸ 070990-TR-ET Part 2, p. 20, lines 19-20.

²⁹ *Idem*, lines 12-17; 072709-TR-ET Part 1, p. 2, line 25 to p. 3, lines 1-17.

³⁰ Request, para. 36.

³¹ *Idem*, para. 36.

³² See KSC-BC-2020-06, F01857, Joint Defence, *Joint Defence Response to Prosecution Motion for Admission of Evidence of Witnesses W03170, W04043, W04444, W04571, W04765, W04811, and W04870 Pursuant to Rule 154 and Related Requests (F01830)*, 13 October 2023, confidential, para. 36.

19. In this regard, the Defence recalls that the Panel has previously expressed concerns about the excessive additional time the SPO required for direct examination of witnesses in light of, *inter alia*, the number of written statements tendered through Rule 154.³³ More recently, the SPO has been rebuked for misusing the courtroom time.³⁴ Furthermore, as previously submitted,³⁵ the SPO will have ample opportunity to “to highlight, clarify or explain certain aspects of W04230’s evidence”³⁶ during the witness’ preparation session.

20. Given the nature and scope of W04230’s evidence, any time savings are likely not to be as significant as asserted.³⁷ Two hours of direct examination will inevitably result in questioning W04230 on issues already contained in the Rule 154 statement, defeating the primary purpose of the Rule 154 procedure.³⁸ W04230’s evidence should thus be heard orally, or the time for direct examination should be reduced.

E. W04445

21. W04445’s SPO interview is a mere 56-pages. Leading the witness *viva voce* rather than through Rule 154 would not increase court time and would provide the clarity that W04445’s evidence lacks at this stage.

³³ See e.g., KSC-BC-2020-06, F01380, Trial Panel II, *Decision on Admission of Evidence of First Twelve SPO Witnesses Pursuant to Rule 154* (“First Rule 154 Decision”), 16 March 2023, confidential, paras 33, 63.

³⁴ Transcript of 11 December 2023, pp. 10951-10952.

³⁵ KSC-BC-2020-06, F01647, Trial Panel II, *Joint Defence Response to the Third Prosecution Motion for Admission of Evidence Pursuant to Rule 154 Concerning the Remaining Eight Witnesses*, 5 July 2023, confidential, para. 28.

³⁶ Request, para. 36.

³⁷ *Idem*, para. 36.

³⁸ First Rule 154 Decision, para. 32.

22. W04445's interview is the sole evidence in the PTB substantiating his detention and that of his brother, [REDACTED],³⁹ as well as the alleged abduction, transfer to KLA Headquarters, and murder of [REDACTED].⁴⁰ W04445's interview is based on hearsay information resulting from his deceased neighbour⁴¹ or unidentified individuals.⁴² The SPO has been unable to locate the newspaper article or autopsy report regarding [REDACTED] death,⁴³ rendering W04445's evidence of negligible probative value.

23. W04445 also suggests that Rexhep Selimi has knowledge of his brother's alleged mistreatment and murder, citing the former as the Minister of Internal Affairs at the time.⁴⁴ However, W04445 does not provide any substantiation for this suggestion, and the SPO does not seek clarification thereof, indicating an implicit awareness of this error. Admitting generalised and unsubstantiated information about Mr. Selimi's knowledge of [REDACTED] mistreatment and murder is highly prejudicial, significantly outweighing the probative value of the evidence.

F. W04489

24. W04489, like [REDACTED], will discuss the disappearance of [REDACTED]. The Defence objects to the admission of [REDACTED] evidence under Rule 154, on the basis that [REDACTED] was a key witness, and one of only a small number of SPO witnesses to make allegations of direct perpetration, implicating three of the four Accused.⁴⁵ The Panel dismissed these concerns, finding that while [REDACTED] Rule 154 statements contained some evidence going to the acts and conduct of some

³⁹ SPO PTB, para. 273, fns 1160-1161.

⁴⁰ *Idem*, para. 281, fns 1211-1214.

⁴¹ 066665-TR-ET Part 1 RED2, pp. 8-9, 15-16.

⁴² 066665-TR-ET Part 2 RED2, pp. 2-3.

⁴³ 066665-TR-ET Part 1 RED2, p. 7; 066665-TR-ET Part 2 RED2, p. 17.

⁴⁴ 066665-TR-ET Part 1 RED2, p. 18; 066665-TR-ET Part 2, p. 26; 066665-TR-ET Part 1, p. 18.

⁴⁵ [REDACTED].

Accused, there was “no indication that that the admission of [REDACTED] evidence would cause prejudice to the Defence. Instead, it should give the Defence a clear understanding ahead of time of what that evidence is.”⁴⁶

25. The Defence raises the same concerns regarding W04489’s proposed evidence.⁴⁷ Amongst the 303 SPO witnesses who will testify in this case, there are very few who allege that the Accused were directly involved in the crimes charged. On this basis, the centrality of W04489’s evidence to the SPO case makes it unsuitable for admission through Rule 154.

26. Other factors also support the conclusion that W04489’s allegations should be presented *viva voce*. The credibility of [REDACTED], particularly as it concerns the acts and conduct of the three Accused, is at issue in this case. W04489’s evidence focuses on the same events as [REDACTED]. However, [REDACTED] interviews undermine [REDACTED] in certain aspects. W04489’s evidence should be presented *viva voce*, specifically regarding the alleged acts and conduct of the Accused.

27. In prior cases, where the Defence challenged a Prosecution witness’ credibility, and the scope of the testimony demonstrated that the witness was key to the Prosecution case, it was found that the advantages of hearing live testimony outweighed the time saved through the admission of prior statements.⁴⁸ The same principle should be applied to the evidence of W04489.

28. In rejecting the Defence submissions concerning W04489’s [REDACTED] and admitting [REDACTED] evidence pursuant to Rule 154, the Panel held that rather

⁴⁶ [REDACTED]

⁴⁷ Annex 6 to the Request.

⁴⁸ ICTY, *Prosecutor v. Stanišić and Župljanin*, IT-08-91-T, Trial Chamber II, *Decision Denying Prosecution’s Motion for Admission of Evidence of Pedrag Radulović Pursuant to Rule 92ter*, 1 April 2010, para. 10.

than causing prejudice, admission of [REDACTED] would instead “give the Defence a clear understanding ahead of time of what that evidence is.”⁴⁹ The purported advantage to the Defence in having a clear understanding as to what a witness’ evidence will be in advance, cannot come at the expense of the application of the principle of orality.

29. The SPO seeks the admission of the excerpt of a book, which it submits was “shown and discussed” during W04489’s interview.⁵⁰ After discussing [REDACTED] role and the fact that he was killed, W04489 said simply that [REDACTED]⁵¹ This is the extent of the discussion. The SPO later produces the book, to which W04489 answers, “Yes. Yes, this is ... this is the book, yes”.⁵² W04489’s testimony does not contain any discussion of the book’s contents, as [REDACTED] is not the author, had not read it and has no knowledge of its contents. It therefore does not form an inseparable or indispensable part of [REDACTED] statement.

30. The admission of books or their excerpts onto the record is not without impact or potential prejudice. The SPO has given no indication as to why the book in question would be worthy of admission in a criminal case, particularly considering the testimony already heard about books being written after the war exaggerating the role of KLA fighters in self-serving accounts.⁵³

G. W04576

⁴⁹ [REDACTED]

⁵⁰ Annex 6 to Request, p. 2, 067550-067553-ET. The SPO indicates that the associated exhibits listed in Annex 6 “should be admitted”. In Annex 6, 20/21 documents are listed as “NOT TENDERED FOR ADMISSION”. The majority are already admitted. The Defence has limited its submissions to the one exhibit tendered for admission. Should the SPO later seek to tender any of the documents listed as “NOT TENDERED FOR ADMISSION”, the Defence reserves the right to make additional submissions.

⁵¹ 068739-TR-ET Part 3 RED2, p. 8.

⁵² *Idem*, p. 9.

⁵³ *See, e.g.* KSC-BC-2020-06, Transcript of Hearing, 17 October 2023, pp. 9083-9084.

31. The Defence does not contest the *prima facie* authenticity and reliability of W04576's Rule 154 Statements.⁵⁴ However, a further 1.5 hours of direct testimony in addition to W04576's substantial SPO interview is excessive. The SPO should reduce its estimate for direct examination or seek the admission of only those excerpts of W04576's SPO interview relevant to the charges in the present case.

32. W04576's interview has minimal, if any, probative value. Despite W04576 stating [REDACTED] that "there is lots of marketing there, embellishments there" and that he didn't "believe it will help this process a lot",⁵⁵ the SPO continued taking W04576 though numerous excerpts throughout his interview. W04576 had no recollection of the sources of information for [REDACTED], nor the events themselves.⁵⁶

33. The SPO will rely on W04576 for the purposes of his alleged knowledge of the KLA General Staff's role and authority, in relation to the Nerodime Zone.⁵⁷ W04576's evidence is speculative and limited, indicating that he had "never been in person to the General Staff."⁵⁸ His access even at the zone level was limited at that time and he was not in a position to comment on the items proposed by the SPO.⁵⁹ Nor could W04576 substantiate or provide a knowledge base for most of his answers on the purported authority of the KLA General Staff.

34. The Defence objects to the admission of 036622-036837. While [REDACTED], W04576 advised the SPO not to rely on the document owing to its inaccuracy.⁶⁰ He

⁵⁴ 074301-TR-ET Part 1 RED; 074301-TR-ET Part 2 RED; 074301-TR-ET Part 3 RED; 074301-TR-ET Part 4 RED; 074301-TR-ET Part 5 RED; 074301-TR-ET Part 6 RED; 074301-TR-ET Part 7 RED; 074301-TR-ET Part 8 RED; 074301-TR-ET Part 9 RED; 074301-TR-ET Part 10.

⁵⁵ 074301-TR-ET Part 1, p.15.

⁵⁶ See for example 074301-TR-ET Part 6, pp. 8, 14, 16, 19, 21, 24.

⁵⁷ Request, para. 51.

⁵⁸ 074301-TR-ET Part 2, p. 14-15.

⁵⁹ *Idem*, p. 12.

⁶⁰ 074301-TR-ET Part 1, pp. 17, 19.

explained that the claim that [REDACTED],⁶¹ [REDACTED],⁶² [REDACTED],⁶³ and [REDACTED].⁶⁴ Wholesale admission of this record would overburden the trial record with a document [REDACTED] purports to be unreliable and politically motivated.⁶⁵

35. As to the individual pages shown to the witness during his SPO interview, these are included, in combination with the witness' commentary, within the record of that interview. Extracts in respect of which the witness has provided no comment, or which were not read out to him should not be admitted. Should the SPO intend to rely on other parts of [REDACTED], this process should be undertaken in court.

36. Regarding SPOE00091385-00091408 RED, the witness only recognized the location depicted in two of the photographs out of the 21-photograph collection.⁶⁶ As the unredacted version of the entire collection has already been admitted as P372, admission is not necessary.⁶⁷

37. With respect to 043900-043903- ET, the SPO has failed to establish the relevance and probative value of the [REDACTED] which contains no substantive information.

38. The Defence does not object to the admission of pages 044181 and 044183 from 044174-044186-ET. Page 044181 should be tendered for admission via its purported author, who is an SPO witness in the present case ([REDACTED]), and who will be able to provide further information on the contents of this document.

⁶¹ *Idem*, p. 16.

⁶² *Idem*, pp. 16-17.

⁶³ *Idem*, p. 17.

⁶⁴ *Idem*, p. 22.

⁶⁵ *Idem*, p. 19.

⁶⁶ 074301-TR-ET Part 3, p. 8.

⁶⁷ [REDACTED].

39. Regarding 020432-020433 and 101527-101530, the witness was read the relevant parts of those records during his SPO interview⁶⁸ and provided substantive comments, including clarifications and corrections.⁶⁹ W04576's Rule 154 Statement would be entirely unaffected by the non-admission of the two documents.

H. W04739

40. The evidence of W04739 addresses almost exclusively highly contested issues that are central to the SPO's case, including (i) the role and authority of the Accused,⁷⁰ of named JCE members,⁷¹ and of the General Staff as a whole;⁷² (ii) the acts and conduct of the Accused;⁷³ (iii) their knowledge of the crimes charged in the Indictment;⁷⁴ (iv) the existence of parallel reporting lines from brigade and zone-level ZKZ and military police to the General Staff;⁷⁵ (v) the alleged divisions between the General Staff members and other KLA individuals or factions;⁷⁶ and (vi) the alleged policy against opponents.⁷⁷ The SPO refers to W04739 on nearly 40 occasions in its PTB, and relies on its Rule 154 Statement as the sole basis for six separate allegations in its PTB.⁷⁸ Given the centrality of the evidence to the SPO's case, the limited time saving envisaged by presenting his evidence through Rule 154 and the manner in which W04739's interview was conducted by the SPO, his evidence should be presented *viva voce*.

⁶⁸ 074301-TR-ET Part 10, pp. 1-4; 074301-TR-ET Part 9, p. 11.

⁶⁹ 074301-TR-ET Part 9, p. 11.

⁷⁰ 083640-TR-ET Part 6, p. 5; 083640-TR-ET Part 7, pp. 5-7, 18-19.

⁷¹ 083640-TR-ET Part 3, p. 5; 083640-TR-ET Part 1, p. 23; 083640-TR-ET Part 8, pp. 7, 21.

⁷² 083640-TR-ET Part 1, p. 26; 083640-TR-ET Part 3, p. 6; 083640-TR-ET Part 6, p. 9.

⁷³ 083640-TR-ET Part 7, pp. 6, 11, 18; 26-27; 083640-TR-ET Part 6, pp. 1-2, 4, 13; 083640-TR-ET Part 9, pp. 13; 083640-TR-ET Part 8, p. 2.

⁷⁴ 083640-TR-ET Part 9, pp. 21, 29; 083640-TR-ET Part 6, pp. 6, 12, 23.

⁷⁵ 083640-TR-ET Part 3, pp. 4-6; 083640-TR-ET Part 6, p. 25; 083640-TR-ET Part 10, p. 9.

⁷⁶ 083640-TR-ET Part 7, pp. 15-16; 083640-TR-ET Part 6, p. 7; 083640-TR-ET Part 2, p. 4.

⁷⁷ 083640-TR-ET Part 6, p. 21; 083640-TR-ET Part 9, pp. 18, 25-26; 083640-TR-ET Part 10, pp. 6-7.

⁷⁸ SPO PTB, fns 948, 955, 2533-2534, 2545, 2582.

41. The Panel has previously determined that the importance of the proposed evidence to a Party's case is a factor to be considered when assessing admissibility pursuant to Rule 154,⁷⁹ and held that "reasons would have to be particularly compelling" to justify the admission of evidence of that importance in writing, and has refused admission when no such reasons have been shown.⁸⁰ The importance of W04739's evidence on highly contested issues clearly demonstrates its lack of suitability for admission pursuant to Rule 154.

42. In its interview with W04739, the SPO failed to elicit the basis of knowledge underpinning the witness' claims about: (i) the direct reporting line of military police commanders and of assistant commanders to the General Staff, of the motivation for, and modalities and frequency of, such reporting;⁸¹ (ii) the General Staff's control over the military court and the latter's competence;⁸² (iii) the reporting lines of [REDACTED] to the General Staff;⁸³ (iv) the authority of the military police at the "General Staff level" over alleged collaborators;⁸⁴ (v) the Accused's functions, authority and manner in which they were discharged;⁸⁵ (vi) the General Staff's involvement in appointments at zone and brigade level;⁸⁶ (vii) the categories of individuals labelled as collaborators.⁸⁷ Even when SPO prosecutors attempted to establish a foundation for W04739's knowledge, the witness provided vague or contradictory answers which were not clarified.⁸⁸

⁷⁹ First Rule 154 Decision, para. 29.

⁸⁰ KSC-BC-2020-06, In Court – Oral Order, Order on SPO's Application to Admit the Evidence of W04746 Pursuant to Rule 154, 10 July 2023, public.

⁸¹ 083640-TR-ET Part 3, pp. 4-7; 083640-TR-ET Part 9, p. 16.

⁸² 083640-TR-ET Part 6, pp. 9-10.

⁸³ *Idem*, p. 25.

⁸⁴ 083640-TR-ET Part 7, p. 3.

⁸⁵ *Idem*, pp. 6-9; 083640-TR-ET Part 8, p. 8; 083640-TR-ET Part 9, p. 28.

⁸⁶ 083640-TR-ET Part 7, pp. 11, 18.

⁸⁷ 083640-TR-ET Part 9, p. 25-26; 083640-TR-ET Part 10, p. 6.

⁸⁸ 083640-TR-ET Part 9, p. 18, lines 4-5; 083640-TR-ET Part 8, p. 22, lines 17-24.

43. The Defence cannot cross-examine on the basis of abstract allegations by a witness whose role,⁸⁹ and interactions do not explain the basis for making such claims. The expectation that the Defence would do so and elicit the requisite foundation, effectively shifts the burden to the Defence to cure the defects in the SPO's poor questioning. The magnitude of the defects in this instance, requires the Defence to recite the entirety of the record to the witness on the stand and to elicit the witness' basis of knowledge in respect of each claim. Such an exercise would no longer amount to challenging the evidence, but instead to consolidating the SPO's evidence.

44. The suitability for admission of the proposed evidence is further compromised by the SPO eliciting evidence crucial to its case, with respect to the Accused's role and acts and conduct, the reporting lines and divisions within the KLA, via leading,⁹⁰ compound⁹¹ or speculative⁹² questions. The centrality of this evidence should have required more caution on the part of the SPO. The wholesale admission of this evidence would deprive the Defence of its right to raise timely objections to improperly-formulated questions on some of the most contested issues in the present proceedings.

45. There are only a limited number of exhibits associated with W04739's Rule 154 Statement, which are tendered for admission. The time-saving benefit of admitting this evidence via Rule 154 as opposed to *viva voce* will be limited.⁹³ W04739's Rule 154 Statement should therefore be denied admission. Regarding the exhibits associated with W04739, the Defence does not object to the admission of the map of [REDACTED] marked by the witness during his SPO interview.⁹⁴

⁸⁹ [REDACTED] See, for example, 108643-TR-ET Part 3, p. 6.

⁹⁰ 083640-TR-ET Part 7, p. 9, lines 19-25, p. 22, lines 14-25, p. 23, lines 24-25.

⁹¹ 083640-TR-ET Part 7, p. 6, lines 7-11.

⁹² *Idem*, p. 24, lines 12-21; 083640-TR-ET Part 10, p. 7, lines 12-14.

⁹³ See, for example, Transcript of 11 November 2023, pp. 10951-10952.

⁹⁴ 071596-071596.

46. The witness contradicts the SPO's claim that U000-5399-U000-5490-ET is his [REDACTED], stating that the [REDACTED].⁹⁵ He does not remember the document⁹⁶ and only signed it for bookkeeping purposes.⁹⁷ Additionally, the witness could not accurately identify his [REDACTED] in the notebook.⁹⁸ He could not authenticate the document beyond his signature, and explained that it could have [REDACTED].⁹⁹ The document appears to be incomplete, given that: (i) the witness attested that the document contains 186 pages¹⁰⁰ whereas the document contains only 182 pages, and (ii) the handwritten numbering of the pages is discontinued between, for example, pages U000-5456 and U000-5457, and U000-5457 and U000-5458. The *prima facie* authenticity of the document has not been established.

47. The witness provided no substantive comment on the contents of the document, beyond pointing to the use of signs on page U000-5452. That comment, if admitted, is self-contained and the admission of the document would not enhance its probative value and/or relevance. The SPO has failed to establish why the non-admission of [REDACTED] would render W04739's Rule 154 Statement incomprehensible or of lesser probative value.

48. Furthermore, the document is illegible, and lacks specific relevance beyond the SPO claiming that it [REDACTED],¹⁰¹ without specifying the command or providing any independent evidence to support this interpretation. The witness' general statement that [REDACTED]¹⁰² provides no indication that the present document fulfils these criteria. W04739 is merely explaining [REDACTED] rather than

⁹⁵ 083640-TR-ET Part 3, p. 16.

⁹⁶ *Idem*, p. 11.

⁹⁷ *Idem*, p. 13.

⁹⁸ *Idem*, p. 15.

⁹⁹ *Idem*, p. 14.

¹⁰⁰ U000-5399-U000-5490, p. U000-5488.

¹⁰¹ Annex 8 to Request, p. 3, row 2.

¹⁰² 083640-TR-ET Part 3, pp. 13-15.

explaining the particularities of the document.¹⁰³ The SPO failed to connect the legible contents of the document to any matter in dispute; as such its admission would unnecessarily burden an already bloated trial record.

I. W04741

49. The Defence objects to the admission via Rule 154 of this witness's [REDACTED],¹⁰⁴ and several associated exhibits.¹⁰⁵ The SPO submits that this evidence is relevant to the crimes charged in the Indictment, yet the testimony of this witness [REDACTED] is not cited in its PTB. Presumably this is because, as stated by the SPO in their Request, this [REDACTED]."¹⁰⁶ W04741's [REDACTED] testimony is therefore not appropriate for admission through Rule 154, particularly given its low relevance and significant volume - it runs to 173 pages.

50. It is notable that the [REDACTED], having heard this witness' evidence, found him to be a witness of 'diminished credibility', primarily because he had an interest in deflecting responsibility from himself after having been interviewed as a suspect.¹⁰⁷

51. Given these circumstances, it would be inappropriate to admit W04741's [REDACTED], together with the associated exhibits, as this would lead to overburdening the record with items of uncertain relevance that have been found to lack credibility. This would not be conducive to the expeditious and fair conduct of the proceedings.¹⁰⁸

¹⁰³ *Ibid.*

¹⁰⁴ [REDACTED]

¹⁰⁵ [REDACTED]

¹⁰⁶ Request, fn. 72.

¹⁰⁷ [REDACTED]

¹⁰⁸ *See*, First Rule 154 Decision, para. 20.

J. W04820

52. The Defence has no objection in principle to the admission of this witness's SPO interview via Rule 154.¹⁰⁹

53. This notwithstanding, the Defence notes that W04820's SPO interview is replete with leading questions and comments by the SPO associate prosecutors, that would not have been allowed had the evidence been heard orally.¹¹⁰ At times, it appeared more like a cross examination.¹¹¹ It is impossible to assess the extent to which this method of questioning affected the answers given by the witness after the event, but it is a factor that the Defence invite the Panel to be mindful of when assessing whether this (or any) witness's evidence should be admitted via Rule 154, or whether it would be safer in the circumstances to hear it orally, in a manner compliant with how an examination in chief should be conducted.

III. CONCLUSION AND RELIEF REQUESTED

54. In light of the above, the Defence respectfully requests the Trial Panel to take notice of the Defence objections, and

DENY the admission of:

- W02749's Rule 154 statements objected to in paragraphs 15-16;

¹⁰⁹ 094542-TR-ET Part 1 RED2; 094542-TR-ET Part 2 RED3; 094542-TR-AT Part 1 Revised RED2; 094542-TR-AT Part 2 Revised RED3.

¹¹⁰ For example, [REDACTED].

¹¹¹ See, for example, the questioning at, 094542-TR-ET Part 2 RED3, pp. 21-24, regarding [REDACTED].

- W04489's associated exhibit objected to in paragraphs 31-32;

- W04576's associated exhibits, with the exception of those mentioned in paragraph 40;

- W04739's statements and associated exhibits, as objected to in paragraphs 49-51;
and

- W04741's statement, as objected to in paragraphs 53-55;

ORDER the SPO to elicit evidence related to W01163, W04230, W04445, W04489, W04739, and W04820 *viva voce*.

ORDER that the two associated exhibits related to W02749 referenced in paragraphs 17-18 be marked for identification pending the completion of cross-examination.

Word count: 5,936

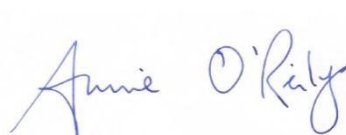
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